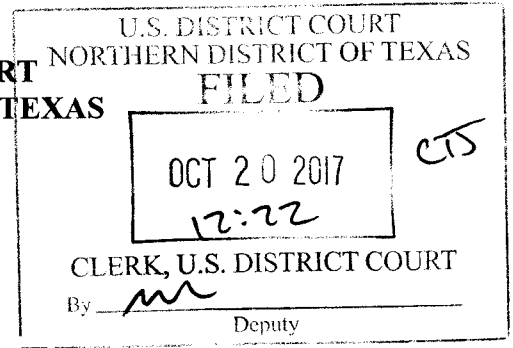


**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**



**SECURITIES AND EXCHANGE  
COMMISSION,**

**Applicant,**

**vs.**

**UPSTATE LAW GROUP, LLC, ET AL.,**

**Respondents.**

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**Misc. Action No.: 4:17-mc-00009-A**

**APPLICANT'S ADDITIONAL BRIEFING IN SUPPORT OF ITS  
REQUEST FOR RELIEF AGAINST RESPONDENT  
FINANCIAL PRODUCT DISTRIBUTORS, LLC**

On September 22, 2017, Applicant Securities and Exchange Commission (the "Commission") filed a motion for an order requiring Respondent Financial Product Distributors, LLC ("FPD") to show cause why it should not be held in contempt for failing to comply with the Court's Order of March 24, 2017 (the "Motion"). [Dkt. 19]. On October 17, 2017, the Court set the Commission's Motion for a 10:00 a.m. hearing on October 26, 2017 and ordered the Commission to file briefing by 4:00 p.m. on October 20, 2017 that describes the specific remedies that the Commission is requesting against FPD. [Dkt. 23, 24]. Accordingly, the Commission files this briefing to describe the specific punishment it is asking the Court to impose on FPD if it is held in contempt, along with the legal authorities that support the imposition of such punishment.

## I. The Commission's Specific Requests<sup>1</sup>

If the Court finds that FPD is in contempt of this Court's March 24, 2017 Order [Dkt. 17], the Commission requests that the Court consider imposing a coercive sanction against FPD in the form of a daily fine, in an amount to be determined by the Court, until FPD complies with the Court's Order of March 24, 2017, and consequently purges itself of civil contempt. The Commission requests that FPD be given one week from the October 26, 2017 hearing to comply with the Court's Order and, if it does not comply by November 2, 2017, that the coercive monetary sanction begin. The Commission further requests that the Court consider a compensatory civil contempt sanction against FPD to compensate the Commission for the reasonable attorneys' fees and costs it had to incur in connection with this contempt proceeding.

## II. Legal Authorities

"Upon a finding of contempt, the district court has broad discretion in assessing sanctions to protect the sanctity of its decrees and the legal process." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 582 (5th Cir. 2005) (citing *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 585 (5th Cir. 2000)). In civil contempt cases, sanctions may be imposed to coerce compliance with a court's order, compensate for losses incurred as a result of non-compliance, or both--as the Commission requests here. *See Am. Airlines, Inc.*, 228 F.3d at 585 (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947)). Specifically, civil contempt sanctions may include a coercive daily fine and a compensatory fine. *See U.S. v. Scott*,

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<sup>1</sup> In its Motion, the Commission requested, among other things, that – if the Court finds FPD and David Woodward, FPD's managing member and owner, to be in contempt of this Court's March 24, 2017 Order – the Court "fashion orders designed to compel compliance with its previous Order, including but not limited to fining FPD and arresting and incarcerating Woodward until FPD purges itself of its contempt." [Dkt. 19, at 8]. At this time, the Commission withdraws its specific request that the Court order Woodward to be arrested and incarcerated, and seeks only sanctions against FPD.

4:03-CV-1410-A, 2004 WL 1068118, at \*3 (N.D. Tex. Apr. 5, 2004) (McBryde, J.) (citing *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827–29 (1994)).

#### **A. Coercive Daily Fine**

Coercive sanctions are designed to make a party comply with a court order. *See, e.g., Goodyear Tire & Rubber Co. v. Haeger*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1178, 1186 n.4 (2017) (citing *Bagwell*, 512 U.S. at 829). “When shaping coercive sanctions, the Court takes into account ‘the character and magnitude of the harm threatened by the continued contumacy,’ ‘the probable effectiveness of [the] suggested sanction in bringing about the result desired,’ and ‘the amount of [the party in contempt’s] financial resources and the consequent seriousness of the burden to that particular defendant.’” *Auto Parts Mfg. Miss. Inc. v. King Construction of Houston, LLC*, No. 1:11-CV-00251-GHD-SAA, 2017 WL 2957735, at \*6 (N.D. Miss. June 14, 2017) (quoting *United Mine Workers of Am.*, 330 U.S. at 303-04)).

FPD’s continued refusal to produce any documents in response to the Commission’s subpoena is impeding the Commission’s investigation into the possible fraudulent offer or sale of pension-income streams. As a result, there is potential considerable harm to both the sellers and buyers of these products. Further, FPD’s persistent refusal to comply with the subpoena and this Court’s March 24, 2017 Order, which it agreed to and subsequently ignored, warrants a hefty daily coercive fine. Because FPD has failed to produce any documents, including those related to its financial condition,<sup>2</sup> the Commission does not know what FPD’s financial resources are and the consequent burden a specific daily fine would impose. Therefore, subject to the

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<sup>2</sup> *See* Appendix in Support of Applicant’s Motion for Order Requiring FPD to Show Cause [Dkt. 20, at 20], Document Request #17: “All documents and communications related to the performance or operating results of FPD and Structured Assets. This includes, without limitation, all financial statements, audited and unaudited balance sheets, income statements, cash flow statements, trial balances, and summaries for each quarterly and annual period, whether prepared for internal or external use.”

evidence, if any, offered by FPD at the hearing, the Commission suggests a daily coercive fine in the range of \$1,000 to \$2,000. *See, e.g., Scott*, 2004 WL 1068118, at \*4 (held, in civil contempt proceeding, that no lesser sanction than coercive incarceration would be effective since defendants did not appear at show cause hearing despite the United States's suggestion of a \$2,000 daily coercive fine).

### **B. Compensatory Attorneys' Fees**

"[C]ourts have 'discretion to award reasonable attorney's fees and other expenses necessary to make an innocent party whole' in a civil contempt proceeding." *S&H Indus., Inc. v. Selander*, No. 3:11-CV-2988-M-BH, 2014 WL 1116700, at \*4 (N.D. Tex. March 20, 2014) (Lynn, J.) (quoting *Dow Chem. Co. v. Chem. Cleaning, Inc.*, 434 F.2d 1212, 1215 (5th Cir. 1970)). In *Selander*, the court held that "[b]ecause Plaintiff has proven that Defendant violated the permanent injunction and that it incurred attorneys' fees in obtaining the finding of contempt, it should be awarded its fees." *Id.* at \*4. Further, to the extent that an award of attorneys' fees and costs to the Commission is contingent on FPD having acted in bad faith, FPD has so acted by ignoring the Commission's subpoena and the Court's Order requiring full compliance with it. *See Auto Parts Mfg. Miss. Inc.*, 2017 WL 2957735, at \*7 (holding that a court must find bad faith by a party to award compensatory sanctions in the form of attorneys' fees, but also noting that bad faith could include, among other things, the failure to comply with orders) (citations omitted).

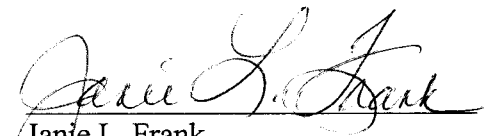
In a civil contempt proceeding, reasonable attorneys' fees are determined pursuant to the lodestar method. *Selander*, 2014 WL 1116700, at \*4 (citations omitted). If the Court, in its discretion, decides that the Commission is entitled to its reasonable attorneys' fees and costs incurred in connection with this contempt proceeding, the Commission requests the opportunity

to present the evidence required by this method or by any other applicable authority at the appropriate time.

The Commission respectfully requests that the Court: find that FPD is in contempt of the Court's March 24, 2017; order FPD to produce all responsive documents to the Commission's subpoena by November 2, 2017; impose a daily fine of such amount as the Court decides in its discretion should be imposed for each day after November 2, 2017, that FPD remains in contempt; and grant the Commission an award of compensatory sanctions in an amount to be determined based on a future motion filed by the Commission.

Dated: October 20, 2017.

Respectfully submitted,



Janie L. Frank

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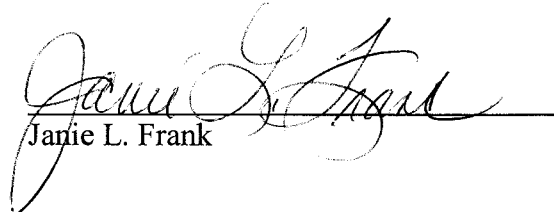
COUNSEL FOR PLAINTIFF SECURITIES AND  
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**CERTIFICATE OF SERVICE**

On October 20, 2017, I served this document via UPS overnight delivery and by emailing it to the following people at the following addresses:

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